IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

COMPANY PETITION NO.146 OF 2006

ICICI Lombard General Insurance Company. ...Petitioner.
Vs.
AFL Private Limited. ...Respondent.

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Mr.Ravi Kadam, Advocate General, Mr. Vikram Trivedi, Ms.Nita Gaglani, Mr. Cyres Ardheshir, Ms.Pooja Sood i/b. M/s.Manilal Kher Ambalal & Co. for the Petitioner.
Mr. M.P. S. Rao for the Respondent.

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CORAM : DR.D.Y.CHANDRACHUD, J.
14th March 2007.

ORAL JUDGMENT:

A consignment of Air Conditioning Systems was transported through the Respondent-Company by Hitachi Home & Life Solutions (India) Ltd. under three Lorry Receipts dated 29th October 2004. The goods were insured by Hitachi with the Petitioner under a Policy of Insurance dated 1st June 2004. Hitachi lodged a claim in the amount of Rs.1,75,000/- with the Petitioner under a letter dated 22nd November 2004, on account of loss suffered by the consignor. The Respondent had issued a certificate of damage/shortage/non-delivery. Hitachi made a claim in the amount of Rs.1,70,342/- with the Petitioner under the

insurance cover provided by the Petitioner. The claim was paid by the Petitioner on 25th January 2005. By a declaration executed on 12th January 2005 by Hitachi in favour of the Petitioner, the Petitioner was subrogated to the rights and remedies of the insured under the Policy of Insurance. On 26th July 2005, the Petitioner issued a statutory notice under Sections 433 and 434 of the Companies Act, 1956 calling upon the Respondent to make payment of the outstanding dues in the amount of Rs.1,70,342/- as on 25th January 2005 with further interest at the rate of 21% per annum. This was followed by a reminder dated 28th November 2005. Eventually, a petition for winding up has been instituted.

2. The Respondent has filed an affidavit in reply in these proceedings opposing the Company Petition. The maintainability of the Company Petition has been called into question on the ground that the claim of the Petitioner is to recover a loss or damage sustained allegedly on account of the negligence of the Company. The Respondent submits that this can only be proved in a civil suit and the winding up petition would not be maintainable.

According to the Respondent, there is neither a debt due or payable, nor is there any ascertained liability.

3. The submission which has been urged on behalf of the Petitioner is that under the provisions of the Carriers' Act, 1865, the Plaintiff in a suit for loss, damage and non-delivery of goods against a common carrier is not required to prove that such loss, damage or non-delivery was due to the negligence or a criminal act of the carrier, his servants or agents. It was urged that in **Patel Roadways Ltd.vs. Birla Yamaha Ltd.**,[1] the Supreme Court held that the forum constituted under the Consumers Protection Act, 1986 can entertain a complaint against a carrier of goods, alleging a loss of goods entrusted for transportation. It was submitted that extending the principle that was laid down in **Patel Roadways**, this Court should hold that a Company Petition for winding up under Sections 433 and 434 of the Companies' Act, 1956 would be maintainable.

Section 8 of the Carriers' Act, 1855 provides as follows:

"8. Common carrier liable for loss or damage caused by

1 AIR 2000 SC 1461

> neglect or fraud of himself or his agent.- Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property (including container, pallet or similar article of transport used to consolidate goods) delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of Section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants."

The plain consequence of the provisions of Section 8 is that a common carrier is liable for loss or damage to the property delivered to him for carriage where such loss or damage has arisen either from (i) a criminal act of the carrier or of his servants or agents; or (ii) the negligence of the carrier or his servants or agents.

4. Section 9 of the Carriers' Act, 1865 however, provides that in such a suit against a common carrier for loss, damage and non-delivery of goods entrusted, it shall not be necessary for the Plaintiff to prove that such loss, damage or non-delivery was on account of the negligence or criminal act of the carrier or of his

servants or agents. In **Patel Roadways Ltd. vs. Birla Yamaha Ltd.**,[2] the Supreme Court, while elucidating the meaning of the provisions of Sections 8 and 9 held that the liability of the common carrier under the Carriers Act is that of an insurer. The effect of Section 9 is that it is not necessary for the Plaintiff to establish negligence. Consequently, the general principle in cases of tortious liability, that a party who alleges negligence against the other must prove the act of negligence, has no application to a case covered by the Carriers Act. Following the judgment in **Patel Roadways**, in **M/s.Economic Transport Organisation vs. Dharward Distt. Khadi Gramudyog Sangh**,[3] the Supreme Court held that it is for the carrier to prove the absence of negligence. In such a case it is for the Defendant to establish that he had taken reasonable care and exercised due diligence in the transportation of the goods.

5. The liability under Section 8 of the Carriers Act, 1865 is conditioned upon the negligence or a criminal act of the carrier, his

2 AIR 2000 SC 1461
3 AIR 2000 SC 1635

agent or servant. The Plaintiff in the suit does not have to prove that the loss, damage or non-delivery of goods entrusted was not due to negligence or a criminal act of the carrier. The burden lies on the carrier to establish that he had exercised due diligence and reasonable care in the transportation of the goods. Section 8 provides for the conditions in which liability can be fastened. Section 9 deals with the burden of proof. Section 9 does not detract from the basis on which liability is attracted. The liability under Section 8 would be fasten upon the criminal act of the carrier or where a loss or damage has arisen from his negligence or the negligence of his servants.

6. A Company Petition for winding up under Sections 433 and 434 of the Companies Act, 1956 can be entertained where there is a debt due or in other words, where there is an ascertained liability. A debt is a sum of money which has become payable or which becomes payable in future by a reason of a present obligation. Unless the negligence of the carrier stands established in accordance with the provisions of Sections 8 and 9 of the

Carriers Act, 1865, there is no occasion for a debt being due, for there is no ascertained liability. Whether or not negligence has been established is a matter which necessitates adjudication on the basis of evidence recorded at the trial of a Civil Suit. The report of a Surveyor has to be tested on the anvil of evidentiary principles when evidence is adduced in a suit for recovery. The report of the Surveyor does not *ipso facto* establish a debt due and payable. The remedy in winding up is clearly not available when there is a bona fide dispute. The ascertainment of liability and the quantification of damages are issues on which evidence has to be adduced at the trial of a civil suit and a finding of fact has to be recorded. As the Supreme Court held in **Patel Roadways** (supra) the question can be addressed before the Consumer fora constituted under the Consumer Protection Act, 1986 as well. Those fora do have the power and jurisdiction to resolve matters of fact and render factual determinations. However, unless a debt is due and payable, the remedy of winding up is not available.

7. On behalf of the Petitioner, reliance has been placed on

the judgment of a Division Bench of the Karnataka High Court in **Kudremukh Iron Ore Co. Ltd. vs. Rooky Roadways Ltd.**[4] The decision of the Karnataka High Court is clearly distinguishable for more than one reason. For one thing, in that case, there was absolutely no dispute about the short delivery of a consignment that was entrusted for delivery. The statement of fact shows that the Petitioner, Kudremukh Iron Ore Company had entrusted goods for carriage to the Respondent between the Cities of Bangalore and Mangalore. However, the short delivery of the consignment was brought to the notice of the Company and an acknowledgement was issued by the Company. The Company in fact sought the grant of time for making good the short delivery. This is evident from the following extract of the judgment of the Division Bench :

> "When short delivery of the said materials by the respondent-company was brought to the notice of its managing director, the same was acknowledged by the letter, yet was not made good. The liability of the common carrier arising under section 8 of the Carriers act, 1865 (for short "the Carriers Act"), to the owner of the goods for the undelivered goods, made the respondent-company, a common carrier liable to the Petitioner, the owner of steel materials, for such steel

4 1990 (69) Company Cases 178

> materials, the goods short-delivered. Further, section 9 of the Carriers act enabled the petitioner to bring a suit against the respondent-company to enforce the latter's said liability without the need for it to prove that the short delivery of the steel materials was due to the negligence or criminal act of the respondent-company, its servants or agents."

That apart, the Division Bench also noted that the matter was uncontested before the Learned Single Judge who had heard the Company Petition ex-parte. There was no response even to the statutory notice for winding up that was issued under the provisions of Sections 434 and 438 of the Companies Act, 1956. The observations of the Karnataka High Court, therefore, must be read in the context of the fact that there was no denial of the liability of the common carrier in that case. In contrast, the reply that has been filed on behalf of the carrier in the present case does set up a triable issue. The Petition for winding up would in the circumstances be clearly not maintainable.

8. Before concluding, it would be necessary to note that one of the objections of the Respondent was that the claim of the

Petitioner is on the basis of subrogation; the Supreme Court has held in **Union of India vs. Sri Sarada Mills Ltd.**,[5] that subrogation does not confer any independent right on an underwriter to maintain in his own name and without reference to the person assured an action for damage to the thing insured. The right of the assured has been held not to be one of those rights which are incident to the property insured. The action here has been brought independently in the name of the insurance company. However, in view of the conclusion which I have arrived at that the winding up petition is even otherwise not maintainable it is not necessary for this Court to consider the objection any further.

9. The Petitioner would be at liberty to pursue its claim in the appropriate forum.

10. The petition is dismissed.

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5 AIR 1973 SC 281